

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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CEDRIC V. PETERSON,  
Plaintiff,

NO. CIV S-05-0423 FCD/KJM

v.

MEMORANDUM AND ORDER

JP MORGAN CHASE BANK, et al.,  
Defendants.

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This matter is before the court on defendants' motion to dismiss plaintiff's complaint, pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.<sup>1</sup> Specifically, defendants assert that plaintiff's first, second, and eighth claims for relief for wrongful foreclosure, breach of contract, and injunctive relief, respectively, are barred by the doctrines of res judicata and collateral estoppel. Furthermore, defendants contend that plaintiff's claims of statutory violations of the federal Truth

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<sup>1</sup> Because oral argument will not be of material assistance, the court orders the matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

1 in Lending Act ("TILA"), the federal Fair Debt Collection  
2 Practices Act ("FDCPA"), the California Consumer Legal Remedies  
3 Act ("CLRA"), and the California Rosenthal Fair Debt Collection  
4 Practices Act ("RFDCPA") are barred by the statute of limitations  
5 and/or have no substantive merit. Finally, defendants assert  
6 that plaintiff has failed to state a claim against them for  
7 violation of the California Real Estate Settlement Procedures Act  
8 ("RESPA").

9 **BACKGROUND**

10 Plaintiff, Cedric V. Peterson ("Peterson"), alleges that on  
11 or about August 28, 2001, he executed a promissory note ("Note")  
12 secured by a deed of trust ("Deed") to New Century Mortgage  
13 Corporation ("New Century"). (Compl., filed March 2, 2005, at 4-  
14 5). The Note and Deed covered real property located at 8675 Elm  
15 Avenue, Orangevale, California, 95662, which was Peterson's  
16 residence. (Id.). The Deed was recorded with the County  
17 Recorder of Sacramento County on September 5, 2001. (Id.; Deed  
18 of Trust, Ex. A to Defs.' Req. for Judicial Notice ["RJN"]).

19 On or about September 10, 2001, the Deed was assigned to JP  
20 Morgan Chase Bank ("JP Morgan"), as trustee, under a pooling and  
21 servicing agreement dated June 1, 2002, among Credit-Based Asset  
22 Servicing and Securitization LLC, Salomon Brothers Mortgage  
23 Securities VII, Inc., Litton Loan Servicing LP and JP Morgan  
24 Chase Bank, Salomon Mortgage Loan Trust, C-BASS Mortgage Loan  
25 Asset-Backed Certificates, and Series 2002-CB3, without recourse.  
26 (Corp. Assignment of Deed of Trust, Ex. B to RJN). Thus, JP  
27 Morgan, as trustee, became the beneficiary of the Deed. (Id.).  
28

1 On February 15, 2002, Litton Loan Servicing LP ("Litton")  
2 was appointed loan servicing agent for JP Morgan as trustee.  
3 (Mot. to Dismiss, filed July 29, 2005, at 4). On August 30,  
4 2002, Litton instructed Quality Loan Service Corporation  
5 ("Quality Loan"), as trustee, to commence non-judicial  
6 foreclosure proceedings on Peterson's property by recording and  
7 serving a Notice of Default. (Compl. at 4; Notice of Default,  
8 Ex. C to RJN). Peterson failed to cure the default and thus a  
9 Notice of Sale was recorded on December 5, 2002. (Notice of  
10 Sale, Ex. D to RJN).

11 On April 10, 2003, Quality Loan conducted a foreclosure sale  
12 and sold Peterson's property to defendant JP Morgan to satisfy  
13 the debt. (Compl. at 4; Trustee's Deed Upon Sale, Ex. E to RJN).

14 On May 11, 2003, Peterson and his wife filed a state court  
15 complaint in the Sacramento County Superior Court against JP  
16 Morgan, *et. al.* ("defendants") to set aside the trustee sale,  
17 quiet title, cancel trustee's deed, accounting, fraud, and  
18 injunctive relief. (State Compl., Ex. F to RJN). On October 5,  
19 2004, the Sacramento County Superior Court granted defendants'  
20 motion for summary judgment as to all claims and entered judgment  
21 in favor of defendants. (Tentative Ruling, Ex. G to Defs. RJN).  
22 Subsequently, the court entered a Judgment and Amended Judgment  
23 awarding attorneys' fees and costs to defendants. (Ex. H to  
24 RJN).

25 On April 29, 2005, plaintiff and his wife appealed the  
26 decision of the superior court. The appellate court granted  
27 defendants' motion to dismiss the appeal on July 27, 2005.  
28 (Appellate Dismissal, filed July 7, 2005, Ex. I to RJN).

1 On March 2, 2005, before appealing the state action,  
2 Peterson filed an action in this court against defendants,  
3 alleging breach of contract, wrongful foreclosure, injunctive  
4 relief, and violations of TILA, RESPA, FDCPA, RFDCPA, and CLRA.

5 Defendants now move to dismiss the instant action under Rule  
6 12(b) (6) on the grounds that Peterson's claims are either barred  
7 by res judicata or collateral estoppel, barred on statute of  
8 limitations grounds, or fail to state a viable claim. (Mot. to  
9 Dismiss at 6-12).

10 **STANDARD**

11 On a motion to dismiss, the allegations of the complaint  
12 must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322  
13 (1972). The court is bound to give the plaintiff the benefit of  
14 every reasonable inference to be drawn from the "well-pleaded"  
15 allegations of the complaint. Retail Clerks Int'l Ass'n v.  
16 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff  
17 need not necessarily plead a particular fact if that fact is a  
18 reasonable inference from facts properly alleged. See id.

19 Given that the complaint is construed favorably to the  
20 pleader, the court may not dismiss the complaint for failure to  
21 state a claim unless it appears beyond a doubt that the plaintiff  
22 can prove no set of facts in support of the claim which would  
23 entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45  
24 (1957); NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th  
25 Cir. 1986).

26 Nevertheless, it is inappropriate to assume that the  
27 plaintiff "can prove facts which it has not alleged or that the  
28 defendants have violated the . . . laws in ways that have not

1 been alleged." Associated Gen. Contractors of Cal., Inc. v. Cal.  
2 State Council of Carpenters, 459 U.S. 519, 526 (1983). Moreover,  
3 the court "need not assume the truth of legal conclusions cast in  
4 the form of factual allegations." United States ex rel. Chunie  
5 v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

6 In ruling upon a motion to dismiss, the court may consider  
7 only the complaint, any exhibits thereto, and matters which may  
8 be judicially noticed pursuant to Federal Rule of Evidence 201.  
9 See Mir v. Little Co. Of Mary Hosp., 844 F.2d 646, 649 (9th Cir.  
10 1988); Isuzu Motors Ltd. v. Consumers Union of United States,  
11 Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

## 12 ANALYSIS

### 13 I. Claims for Breach of Contract, Wrongful Foreclosure, and 14 Injunction

15 In his first, second, and eighth claims for relief against  
16 defendants, plaintiff alleges breach of contract, wrongful  
17 foreclosure, and entitlement to injunctive relief. These claims  
18 cannot stand, however, because they are barred by the doctrines  
19 of res judicata and/or collateral estoppel.

#### 20 A. Res Judicata and Collateral Estoppel

21 The Full Faith and Credit Act, 28 U.S.C. § 1738 ("FFCA"),  
22 does not allow federal courts to employ their own rules of res  
23 judicata in determining the effect of state court judgments.  
24 Rather, FFCA requires federal courts to apply rules chosen by the  
25 state from which judgment is taken. Parsons Steel, Inc. v. First  
26 Alabama Bank, 474 U.S. 518, 523 (1986). A federal court must  
27 give to a state-court judgment the same preclusive effect as  
28 would be given that judgment under the law of the state in which

1 the judgment was rendered, absent a federal law modifying the  
2 operation of FFCA. Migra v. Warren City School Dist. Bd. of Ed.,  
3 465 U.S. 75, 81 (1984).

4 Under California law, res judicata describes the preclusive  
5 effect of a final judgment on the merits. Mycogen Corp. v.  
6 Monsanto Co., 28 Cal. 4th 888, 896 (2002). Res judicata has a  
7 "double aspect." Todhunter v. Smith, 219 Cal. 690, 695 (1934).  
8 "In its primary aspect," commonly known as claim preclusion, it  
9 "operates as a bar to the maintenance of a second suit between  
10 the same parties on the same cause of action." Clark v. Leshner,  
11 46 Cal. 2d 874, 880 (1956). "In its secondary aspect," commonly  
12 known as collateral estoppel, "[t]he prior judgment . . .  
13 'operates' in a second suit . . . based on a different cause of  
14 action . . . 'as an estoppel or conclusive adjudication as to  
15 such issues in the second action as were actually litigated and  
16 determined in the first action.'" Id. (citing Todhunter, 219  
17 Cal. at 695). The prerequisite elements for applying res  
18 judicata to either an entire claim or one or more issues are the  
19 same: (1) a claim or issue raised in the present action is  
20 identical to a claim or issue litigated in a prior proceeding,  
21 (2) the prior proceeding resulted in a final judgment on the  
22 merits, and (3) the party against whom the doctrine is being  
23 asserted was a party or in privity with a party to the prior  
24 proceeding. People v. Barragan, 32 Cal. 4th 236, 252-53 (2004)  
25 (citing Brinton v. Bankers Pension Services, Inc., 76 Cal. App.  
26 4th 550, 556 (1999)).

1                   **1. Identical claim adjudicated in prior proceeding**

2           A valid final judgment on the merits in favor of a defendant  
3 serves as a complete bar to further litigation on the same cause  
4 of action. Busick v. Workmen's Comp. Appeals Bd., 7 Cal. 3d 967,  
5 973 (1972). "For purposes of identifying a cause of action under  
6 res judicata, 'California has consistently applied the primary  
7 rights theory under which the invasion of one primary right gives  
8 rise to a single cause of action.'" Branson v. Sun-Diamond  
9 Growers, 24 Cal. App. 4th 327, 340 (1994) (citing Slater v.  
10 Blackwood, 15 Cal. 3d 791, 795 (1975)). A "cause of action is  
11 based on the harm suffered, as opposed to the particular theory  
12 asserted by the litigant. Even where there are multiple legal  
13 theories upon which recovery might be predicated, one injury  
14 gives rise to only one claim for relief." Branson, 24 Cal. App.  
15 4th at 340-41. Thus, two actions constitute a single cause of  
16 action if they both affect the same primary right. Gamble v.  
17 General Foods Corp., 229 Cal. App. 3d 893, 898 (1991).

18           In his state court complaint, plaintiff's asserted primary  
19 right was the right to title of his property for his use and  
20 enjoyment.<sup>2</sup> (See generally State Compl., Ex. F to RJN). The  
21 alleged injury was the wrongful and invalid foreclosure of his  
22 property by defendants. (Id.). The causes of action plead in  
23 the state court complaint were: to set aside trustee sale, quiet  
24 title, cancel trustee's deed, accounting, and injunctive relief.  
25 (Id.).

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27           <sup>2</sup> Peterson and his wife were both plaintiffs in the state  
28 court action. For simplicity and consistency, this order refers  
to one plaintiff in that action.

1 The state trial court granted summary adjudication as to all  
2 causes of action. (Tentative Ruling, Ex. G to RJN, at 1). In  
3 particular, with respect to the causes of action to set aside the  
4 trustee sale and quiet title, the trial court found that  
5 defendants met their burden of proof as to a revised forbearance  
6 agreement between plaintiff and Litton, and plaintiff's  
7 subsequent failure to comply with the terms of that agreement.  
8 (Id.). As to the cause of action for an accounting, the court  
9 stated that defendant Litton, the loan servicing agent at the  
10 time, confirmed receipt of plaintiff's January and February 2003  
11 payments despite plaintiff's contention that Litton had not  
12 confirmed receipt. (Id.). Finally, as to the causes of action  
13 for fraud, to quiet title, and for injunctive relief, the court  
14 found that no triable issues of material fact remained, requiring  
15 award of summary judgment in defendants' favor. (Id.).

16 In the present case, plaintiff alleges, inter alia, breach  
17 of contract by defendants. Specifically, plaintiff claims that  
18 "defendant[s] . . . failed to acknowledge receipt of funds  
19 tendered by plaintiff in payment on the note . . . pursuant to  
20 the terms of one or more forbearance agreements." (Compl. at 4).  
21 This allegation mirrors plaintiff's state court allegation.  
22 (State Compl., Ex. F to RJN, at 6) (alleging defendants violated  
23 terms of Note and Deed and such violations were a material  
24 breach). The state court adjudicated the issue of whether  
25 defendants failed to comply with the terms of the  
26 contract/agreement and determined the issue in favor of  
27 defendants, finding "no disputed material facts remain[ed]."  
28 (Tentative Ruling, Ex. G to RJN, at 1). Thus, res judicata



1 applies to plaintiff's instant breach of contract claim.

2 Furthermore, plaintiff alleges herein wrongful foreclosure  
3 and asks for injunctive relief thereto. Again, these claims  
4 mirror plaintiff's state court allegations. (State Compl., Ex. F  
5 to RJN, at 5-12, 22) (alleging numerous invalid foreclosure  
6 proceedings and asking court to restrain all action inconsistent  
7 with plaintiff's title and right to possession of property). The  
8 trial court determined that the foreclosure sale was valid and  
9 thus denied plaintiff injunctive relief. (Tentative Ruling, Ex.  
10 G to RJN, at 1-2). Under res judicata principles, plaintiff  
11 cannot now relitigate those issues.<sup>3</sup>

## 12 2. Final adjudication on the merits

13 To have the conclusive effect of res judicata, an  
14 adjudication must be a judgment or final order in an action  
15 before a court or judge having jurisdiction to pronounce the  
16 judgment or order. Cal. Code Civ. Proc. § 1908(a). If a  
17 judgment is still open to direct attack by appeal or otherwise,  
18 it is not final and res judicata does not apply. Nat'l Union  
19 Fire Ins. Co. v. Stites Prof. Law Corp., 235 Cal. App. 3d 1718,  
20 1726 (1991). Plaintiff has already pursued, and has been denied,  
21 an appeal of the state trial court's award of summary  
22 adjudication. Thus, res judicata may be applied in this case.

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24 <sup>3</sup> Additionally, it is noteworthy that California case law  
25 provides that a judgment adjudicating the title or interest of  
26 parties in property within California is conclusive as to what is  
27 determined at the time of its rendition. See generally In re  
28 Estate of Clark, 190 Cal. 354 (1923); Gerlach v. Copeland, 212  
Cal. 758 (1931). Thus, once the right to possession of real  
property is adjudicated, it cannot be relitigated between the  
parties. See generally Bank of America Nat'l Trust & Sav. Ass'n  
v. McLaughlin, 22 Cal. App. 2d 411 (1937); Bracey v. Gray, 65  
Cal. App. 2d 282 (1944).

1                   **3. Parties to the prior proceeding**

2           The parties do not dispute that plaintiff's federal  
3 complaint names the same defendants as in the state court action.

4           For the foregoing reasons, this court finds that plaintiff's  
5 claims for relief for breach of contract, wrongful foreclosure,  
6 and an injunction are barred by the doctrine of res judicata.  
7 Therefore, defendants' motion to dismiss plaintiff's first,  
8 second, and eighth claims for relief is GRANTED with prejudice.<sup>4</sup>

9                   **II. Claims for Violations of TILA, RESPA, RFDCPA, and CLRA**

10          In his third, fourth, sixth, and seventh claims for relief,  
11 plaintiff alleges defendants violated TILA, RESPA, RFDCPA, and  
12 CLRA. Defendants assert, inter alia, that the TILA, RFDCPA, and  
13 CLRA claims are barred by the statute of limitations.<sup>5</sup>

14          The statute of limitations for TILA is one-year from the  
15 date the violation occurs. 15 U.S.C. § 1640(e); 12 U.S.C. §  
16 2614. There is some debate as to whether the TILA statute of  
17 limitations commences on the date the credit contract is  
18 executed, or at the time plaintiff discovered, or should have  
19 discovered the acts constituting the violation. Meyer v.  
20 Ameriquest Mort. Co., 342 F.3d 899, 902 (9th Cir. 2003); Katz v.  
21 Bank of Cal., 640 F.2d 1024, 1025 (9th Cir. 1981). Here,  
22 plaintiff entered into a mortgage loan transaction on August 28,

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24                   <sup>4</sup> Plaintiff's claims of breach of contract, wrongful  
25 foreclosure, and an injunction would likewise be barred by the  
26 doctrine of collateral estoppel; however, that analysis is  
unnecessary because res judicata principles dispose of  
plaintiff's claims.

27                   <sup>5</sup> While defendants do not specifically raise RESPA,  
28 certain RESPA violations have a one-year statute of limitations  
and thus the equitable tolling analysis, below, applies.

2001. (Compl. at 3). Plaintiff filed his federal complaint on March 2, 2005, alleging claims surrounding a foreclosure sale occurring April 10, 2003. Even under the more expansive "discovery" rule, plaintiff's TILA allegations are clearly outside the one-year statute of limitations.<sup>6</sup>

The statute of limitations for RFDCPA is one year from the date of the violation. Cal. Civ. Code § 1788.30(f). In his complaint, plaintiff alleges that defendants "threatened to take (and did take) an action prohibited by law, in noticing and conducting the April 10, 2003 trustee's sale and prosecution of the subsequent unlawful detainer action." (Compl. at 12) (emphasis added). Thus, this claim is outside the applicable statute of limitations.

The statute of limitations for CLRA is three years from the date of the violation. Cal. Civ. Code § 1783. In his complaint, plaintiff refers to the misrepresentations of "quality, characteristics, benefits and rights of the services involved in the transaction." (Compl. at 13). Plaintiff also refers to the

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<sup>6</sup> Plaintiff invokes 15 U.S.C. section 1640(e) as an alternative statutory timeframe for his TILA claims. Section 1640(e) states:

This subsection does not bar a person from asserting a violation of this title in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action . . . .

As defendants point out, however, this statute is inapplicable to the present action. (Reply, filed September 1, 2005, at 6). The statute offers a defense to a *borrower* in a *creditor's* action to collect a debt. Here, plaintiff is suing defendants, only after satisfaction of a debt by a foreclosure sale, seeking damages for an alleged violation of TILA provisions by defendants. Id. Therefore, § 1640(e) would not render plaintiff's claim timely.

1 "misrepresentations by lender . . . in the consumer lending  
2 transaction." (Id.). The consumer lending transaction at issue  
3 occurred on August 28, 2001. (Id. at 3). Thus, this claim is  
4 also outside the applicable statute of limitations.

5 Regarding RESPA, the statute of limitations is one or three  
6 years from the date of the violation, depending on the  
7 allegations. 12 U.S.C. § 2614. Plaintiff's first allegation  
8 under RESPA, "that defendant[s] have not fully responded in the  
9 form and manner mandated by law" (Compl. at 9) to his qualified  
10 written requests, appears to fall within the three-year statute  
11 of limitations period. See 12 U.S.C. § 2614 (stating that  
12 violation under § 2605 of RESPA warrants three-year statute of  
13 limitations); 12 U.S.C. § 2605 (addressing duty of loan servicer  
14 to respond to qualified written requests). If so, this claim is  
15 not barred by the statute of limitations. However, plaintiff's  
16 second allegation under RESPA, that defendants "violated RESPA in  
17 the deceptive disclosures regarding the Yield Spread Premium,"  
18 (Compl. at 9) falls under a one-year statute of limitations  
19 period. See 12 U.S.C. § 2614 (stating that violation under §  
20 2607 of RESPA warrants one-year statute of limitations); 12  
21 U.S.C. § 2607 (eliminating payment of unearned fees in connection  
22 with settlement services provided in federally related mortgage  
23 transactions). Plaintiff concedes this second allegation is  
24 outside the applicable statute of limitations, but argues it is  
25 "nonetheless indicative of . . . defendant's bad faith." (Compl.  
26 at 9).

1 Plaintiff responds that his TILA, RFDCPA, and CLRA claims<sup>7</sup>  
2 have been equitably tolled during the pendency of the underlying  
3 state court proceedings. Under California law, the plaintiff has  
4 the burden of establishing entitlement to equitable tolling.  
5 Elshirbiny v. Hewlett Packard Co., 2001 U.S. Dist. LEXIS 7087, at  
6 \*13 (D. Cal. 2001); see also Hinton v. Pacific Enterprises, 5  
7 F.3d 391, 395 (9th Cir. 1993). The plaintiff must satisfy these  
8 factors: timely notice to the defendants in filing the first  
9 claim, lack of prejudice to the defendants in gathering evidence  
10 for the second claim, and good faith and reasonable conduct in  
11 filing the second claim. Cervantes v. City of San Diego, et.  
12 al., 5 F.3d 1273, 1275 (9th Cir. 1993); see Donoghue v. Orange  
13 County, 848 F.2d 926, 931 (9th Cir. 1987).

14 The Ninth Circuit has recognized that "California's fact-  
15 intensive test for equitable tolling is more appropriately  
16 applied at the summary judgment or trial stage of litigation."  
17 Cervantes, 5 F.3d at 1276. "At a minimum, determining the  
18 applicability of equitable tolling necessitates resort to the  
19 specific circumstances of the prior claim: parties involved,  
20 issues raised, evidence considered and discovery conducted." Id.  
21 "Thus, the question ordinarily requires reference to matters  
22 outside the pleadings, and is generally not amenable to  
23 resolution on a Rule 12(b)(6) motion, where review is limited to  
24 the complaint alone." Id.

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27 <sup>7</sup> Plaintiff does not specifically invoke equitable  
28 tolling for RESPA, however, as set forth above, the equitable  
tolling analysis also applies to RESPA.

1 The sole issue then to consider for this motion becomes  
2 "whether the complaint, liberally construed in light of [ ]  
3 notice pleading [ ], adequately alleges facts showing the  
4 *potential* applicability of the equitable tolling doctrine." Id.  
5 In light of this query, the Ninth Circuit has held that "an  
6 allegation of the continued pendency of prior actions suffices to  
7 overcome a motion to dismiss." Id.; see Emrich v. Touche Ross &  
8 Co., 846 F.2d 1190, 1200 (9th Cir. 1988) ("[W]e conclude the  
9 dismissal of the complaint was improper as a matter of law  
10 because the face of the complaint invoked state and federal  
11 equitable tolling doctrines as it alleged the pendency of two  
12 prior actions.").

13 Here, plaintiff's complaint contains references, albeit  
14 cursory, to "the currently pending Superior Court action for  
15 unlawful detainer" and the "action in the unlawful detainer  
16 proceeding in the Superior Court of Sacramento County." (Compl.  
17 at 13). Because this court must construe plaintiff's complaint  
18 liberally, plaintiff has alleged, at least, the *potential* for  
19 equitable tolling. Therefore, the court cannot find, at this  
20 juncture, that his claims are barred by the applicable statutes  
21 of limitations.

### 22 **III. Substantive Merits of Claims Under TILA, RESPA, RFDCPA,** 23 **CLRA, and FDCPA**

#### 24 **A. TILA**

25 Defendants assert that the TILA claim should be dismissed  
26 because they are statutorily exempt from its provisions as  
27 assignees of mortgage loans rather than *creditors*. To support  
28

1 their assertion, defendants point to the definition of "creditor"  
2 as defined in section 1602 of TILA:

3 [A] person who both (1) regularly extends, whether  
4 in connection with loans, sales of property or  
5 services or otherwise, consumer credit which is  
6 payable by agreement in more than four installments  
7 or for which the payment of a finance charge is  
8 or may be required, and (2) is the person to whom  
the debt arising from the consumer credit trans-  
action is initially payable on the face of the  
evidence of indebtedness or, if there is no such  
evidence of indebtedness, by agreement.

9 Defendants claim that New Century, as the original lender, is the  
10 "person to whom the debt [was] initially payable." Thus, because  
11 JP Morgan became the trustee by virtue of an assignment from New  
12 Century, it is not a "creditor" under TILA.

13 Defendants further rely on Bescos v. Bank of America, 105  
14 Cal. App. 4th 378 (2003), contending that in Bescos, the court  
15 held that assignees of mortgage loans and their agents are  
16 expressly excluded from TILA. However, Bescos does not so hold.  
17 Instead, the Bescos court states that the 1980 amendment to  
18 TILA's definition of creditor "will eliminate confusion under the  
19 current act as to the responsibilities of assignees and  
20 'arrangers of credit.'" Id. at 389. This is not an express  
21 finding absolving assignees of mortgages from statutory  
22 liability.

23 Moreover, 15 U.S.C. § 1641(a) specifically states that an  
24 action brought under TILA "against a creditor may be maintained  
25 against any assignee of such creditor [ ] if the violation . . .  
26 is apparent on the face of the disclosure statement, except where  
27 the assignment was involuntary." Plaintiff's complaint alleges  
28 numerous disclosure violations on the part of defendants.

(Compl. at 5-9). For these reasons, plaintiff has alleged sufficient facts to state a claim against defendants for violations of TILA. Thus, defendants' motion to dismiss plaintiff's TILA claim is DENIED.

**B. RESPA**

Plaintiff alleges that defendants violated RESPA by failing to "fully respond[] in the form and manner mandated by law." (Compl. at 9). Plaintiff further claims that defendants violated RESPA "in the deceptive disclosures regarding the Yield Spread Premium." (Id.) As described above, as to this latter allegation, plaintiff has demonstrated the potential for equitable tolling.<sup>8</sup>

In support of dismissal of the RESPA claim, defendants argue that they fulfilled their statutory duties under RESPA by *responding* to plaintiff's written request. (Mot. to Dismiss at 11). Plaintiff's claim, however, is not based on a failure to respond but rather the substantive inadequacy of the response. Such allegations challenging the substance of defendants' response under the statute sufficiently state a claim against defendants for violation of RESPA. Thus, defendants' motion to dismiss plaintiff's RESPA claim is DENIED.<sup>9</sup>

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<sup>8</sup> Equitable tolling is not necessary to the first allegation under RESPA because the applicable statute of limitations is three years.

<sup>9</sup> Defendants do not address plaintiff's allegations of deceptive disclosures concerning the Yield Spread Premium. These allegations also sufficiently state a claim against defendants for violation of RESPA.



1           **C.     RFDCPA**

2           Plaintiff alleges defendants violated the RFDCPA by taking  
3 "an action prohibited by law, in noticing and conducting the  
4 April 10, 2003 trustee's sale and prosecution of the subsequent  
5 unlawful detainer action." (Compl. at 12). For the same reasons  
6 as set forth above, regarding plaintiff's claims for breach of  
7 contract, wrongful foreclosure, and injunctive relief, this claim  
8 is barred by res judicata in that the state court found the  
9 foreclosure sale valid. Plaintiff contends, nonetheless, that  
10 defendants' violations of the RFDCPA "are not limited" to the  
11 above-mentioned violation. (Id.). Yet, plaintiff fails to  
12 allege any other specific facts upon which he can base his RFDCPA  
13 claim. (Id.).

14           As such, plaintiff has failed to adequately state a RFDCPA  
15 claim, and defendants' motion to dismiss must be granted.  
16 However, because Rule 15(a) of the Federal Rules of Civil  
17 Procedure provides that leave to amend shall be freely given when  
18 justice so requires, the court will allow plaintiff to amend his  
19 complaint to allege the other purported violations of RFDCPA.

20           **D.     CLRA**

21           Plaintiff alleges that defendants violated the CLRA by  
22 "misrepresenting the quality, characteristics, benefits and  
23 rights of the services involved in the transaction." (Compl. at  
24 12). Defendants set forth a number of arguments in response  
25 (although inconclusive), to demonstrate that they and plaintiff  
26 fall outside the CLRA's purview.

27           First, defendants argue that the statute expressly exempts  
28 from its reach "any transaction which provides for the sale of an

1 entire residence . . . or for the sale of a lot or parcel.”  
2 (Mot. to Dismiss at 12); Cal. Civ. Code § 1754. As this is a  
3 loan for residential real property, defendants seem to imply that  
4 they are thus statutorily exempted. (Mot. to Dismiss at 12).

5 Second, in response to plaintiff’s claim that the loan at  
6 issue is for a refinance, defendants assert that the CLRA’s  
7 provisions “are not applicable to the facts of the instant case  
8 whether the [ ] loan is . . . a purchase money loan or a  
9 refinance.” (Mot. to Dismiss at 8). In support of this  
10 assertion, defendants point to the statutory definition of  
11 “consumer” to apparently imply that plaintiff is not a “consumer”  
12 as defined in CLRA. (Reply at 8). “Consumer,” as statutorily  
13 defined, is “an individual who seeks or acquires, by purchase or  
14 lease, any goods or services for personal, family, or household  
15 purposes.” Cal. Civ. Code § 1761(d). Thus, according to  
16 defendants, because plaintiff is not a “consumer,” this section  
17 is inapplicable.

18 Lastly, defendants cite California Civil Code section  
19 1770(a), which provides that the CLRA applies to “unfair methods  
20 of competition and unfair or deceptive acts or practices  
21 undertaken by any person in a transaction . . . which results in  
22 the sale or lease of goods or services to any consumer.” Again,  
23 by this argument, defendants seem to suggest that because the  
24 “transaction” at issue falls outside the CLRA and plaintiff is  
25 not a “consumer” under the CLRA, they are statutorily exempt.

26 Defendants fail to show decisively, however, that the loan  
27 at issue falls outside the definition of a “transaction . . .  
28 provid[ing] for the sale of an entire residence . . . or for the

1 sale of a lot or parcel." Cal. Civ. Code § 1754. Moreover,  
2 defendants fail to show that they, as loan servicing agents, fall  
3 outside the ambit of "services" as defined under the CLRA. The  
4 CLRA defines "services" as "work, labor, and services for other  
5 than a commercial or business use, including services furnished  
6 in connection with the sale or repair of goods." Cal. Civ. Code  
7 § 1754. Additionally, the CLRA specifically states that its  
8 provisions "shall be liberally construed and applied to promote  
9 its underlying purpose . . . to protect consumers against unfair  
10 and deceptive business practices . . . and provide efficient and  
11 economical procedures to secure such protection." Cal. Civ. Code  
12 § 1760.

13 Thus, the court finds that plaintiff has sufficiently stated  
14 a claim against defendants under the CLRA for alleged  
15 misrepresentations in the consumer lending transaction.  
16 Defendants' motion to dismiss the plaintiff's CLRA claim is  
17 accordingly DENIED.

18 **E. FDCPA**

19 Plaintiff alleges defendants violated the FDCPA in their  
20 attempts to collect a consumer debt plaintiff owed. Plaintiff's  
21 claim cannot stand, however, because defendants do not fall under  
22 the purview of the FDCPA.

23 The FDCPA defines a "debt collector" as "any person . . .  
24 who regularly collects or attempts to collect, directly or  
25 indirectly, debts owed or due or asserted to be owed or due to  
26 another." 15 U.S.C. § 1692a(6). The FDCPA further provides that  
27 the term "debt collector" does not include "any person collecting  
28 or attempting to collect any debt owed or due or asserted to be

1 owed or due another to the extent such activity . . . concerns a  
2 debt which was not in default at the time it was obtained by such  
3 person." Id. at § 1692a(6) (F); see also Barber v. Natl Bank of  
4 Alaska, 815 P.2d 857, 860-61 (Alaska 1991) (holding that FDCPA's  
5 definition of "debt collector" does not encompass collection of  
6 mortgage debt or mortgage service companies servicing debts that  
7 were not in default when servicing commenced). In Schlosser v.  
8 Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003), the  
9 court stated:

10 [F]or purposes of applying the [FDCPA] to a particular  
11 debt . . . debt collector and creditor are mutually  
12 exclusive. If the one who acquired the debt continues  
13 to service it, it is acting much like the original  
creditor that created the debt. On the other hand, if  
it simply acquires the debt for collection, it is  
acting more like a debt collector.

14 Defendants request that the court take judicial notice of  
15 the Corporation Assignment of Deed of Trust (Ex. B to RJN), and  
16 the court grants said request. This document establishes that on  
17 September 10, 2001, New Century assigned the interest in the  
18 property to JP Morgan, as trustee, under a pooling and servicing  
19 agreement. Subsequently, JP Morgan, as trustee, continued to  
20 service the loan through its agent, Litton. The loan, thus, was  
21 not in default when assigned to defendants.

22 Accordingly, plaintiff has failed to show that defendants  
23 were "debt collectors" under the FDCPA. For this reason,  
24 defendants' motion to dismiss plaintiff's claim under the FDCPA  
25 is GRANTED.

#### 26 CONCLUSION

27 For the foregoing reasons, defendants' motion to dismiss as  
28 to plaintiff's claims for violations of TILA, RESPA, and CLRA is

DENIED. Defendants' motion to dismiss as to plaintiff's claims for breach of contract, wrongful foreclosure, FDCPA violations, and an injunction is GRANTED with prejudice. Regarding plaintiff's RFDCPA claim, defendants' motion to dismiss is GRANTED without prejudice; because plaintiff has demonstrated the potential ability to plead sufficient facts under the RFDCPA against defendants, plaintiff is granted fifteen (15) days from the date of this order to file a first amended complaint in accordance with this order. Defendants are granted thirty (30) days from the date of service of plaintiff's first amended complaint to file a response thereto.

IT IS SO ORDERED.

DATED: September 23, 2005

/s/ Frank C. Damrell Jr.

FRANK C. DAMRELL, Jr.

UNITED STATES DISTRICT JUDGE